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The Children's Law Center of Indiana

Adoption

10/06/02

In Re Paternity of Baby W, 774 N.E.2d 570 (Ind. Ct. App. 2002)

In **In Re Paternity of Baby W**, 774 N.E.2d 570 (Ind. Ct. App. 2002), the Court affirmed the decision of the trial court, which dismissed the putative father's paternity action because the putative father did not file the action within thirty days after receiving the pre-birth adoption notice. The Court specifically found that the pre-birth adoption notice substantially complied with the statutory requirements and that the putative father was not entitled to equitable deviation from the implied consent statute because the statute was a "nonclaim" statute. Before giving birth to the child on May 12, 2001, the mother decided to place the child for adoption. The attorney representing the adoptive parents contacted the putative father by phone and then by follow up letter on May 4, 2002. In his letter, the attorney correctly advised the father that he could contest the adoption by filing a paternity action himself, but mistakenly advised him that filing an objection in the adoption court was also an option. However, along with the letter, the attorney also included a pre-birth notice of adoption that was virtually identical to that prescribed under I.C. 31-19-3-4. The notice informed that putative father that the mother intended to place the child for adoption, that to contest the adoption of the unborn child the putative father must file a paternity action no more than thirty days after receiving the notice, that if he did not file a paternity action within thirty days after receiving the notice, his consent to the adoption would be irrevocably implied and he would lose his right to contest the adoption and his right to establish paternity under I.C. 31-14. The notice also informed him that nothing the mother or anyone else said to the putative father would relieve the putative father of his obligations under the notice. On May 21, 2001, the putative father sent the attorney a letter stating that paternity needed to be established before he could consent to the adoption. In October, the mother, the putative father, and the child underwent DNA testing, which revealed a 99% probability that the putative father was the biological parent. On Nov. 9, 2001 the attorney sent the putative father a post-birth notice of adoption in language substantially similar to that prescribed by I.C. 31-19-4-5. In the notice, the putative father was told, inter alia, that if he wished to contest the adoption, he must file a motion to contest the adoption or file a paternity action within thirty days after receiving the notice. Failure to do so would again mean that his consent to the adoption would be irrevocably implied. On Nov. 27, 2001, the adoptive family filed an adoption petition in Daviess County Circuit Court. The putative father filed a motion contesting the petition for adoption in the same action. On Dec. 12, 2001, the putative father filed a petition to establish paternity in the Clay Circuit Court. The adoptive parents then intervened in the Clay Circuit Court paternity action and filed a motion to dismiss on the ground that the court lacked jurisdiction to hear the paternity action because the putative father failed to timely commence the paternity action within thirty days after receiving the pre-birth notice, pursuant to I.C. 31-19-3-1. The trial court granted the adoptive parents' motion to dismiss without explanation. The putative father appealed the dismissal of his paternity action.

Standard of Review. The Court delineated the standards of appellate review of a trial court's grant of a motion to dismiss pursuant to Ind. Trial Rule 12(B)(1). The applicable standard is a



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function of what occurred in the trial court. If the facts before the trial court are not in dispute, then the question of subject matter jurisdiction is purely one of law, and the standard of review is de novo. In *Re Paternity of Baby W* at 575. If the facts are in dispute, appellate review focuses on whether the trial court conducted an evidentiary hearing. *Id.* Where the trial court conducted an evidentiary hearing, its factual findings and judgment are given deference and will be reversed only if they are clearly erroneous. *Id.* When facts are in dispute, but the trial court rules on a paper record without conducting an evidentiary hearing, no deference is given the trial court's factual findings or judgment. *Id.* In the instant case, the trial court did not hold an evidentiary hearing and did not enter findings of fact. The dismissal of the putative father's action is reviewed de novo.

The pre-birth notice provided to the putative father by the adoptive parents substantially complied with the requirements of I.C. 31-19-3-4. The putative father argued that the notice he received did not comply with the dictates of the statute because the letter that accompanied the notice misadvised him of his options and did not advise him that he should retain his own lawyer. The Court first reiterated the purposes of the pre-birth adoption notice statute as it was explained in *In the Matter of Paternity of Baby Girl*, 661 N.E. 2d 873, 877 (Ind. Ct. App. 1996). The underlying purpose of the statute is to facilitate the adoption process by allowing prospective adoptive parents to obtain consent of a putative father before the birth of the child. *Id.* The provision is consistent with the state's interest in promoting the welfare of children by expediting their entry into a suitable stable family unit. *Id.* The process avoids subsequent disruptive interference by the natural parent whose rights have been terminated. *Id.* Based upon this public policy, an adoption statute should not be construed so strictly as to defeat its purpose. *Id.* The Court held that substantial compliance with the statutory notice provision will be sufficient if the party receives notice which achieves the purpose for which the statute was intended. In *Re Paternity of Baby W* at 576. In this case, even though the putative father received a statement which could have been misconstrued, he did receive notice as contemplated by the statute. He was unequivocally named as a putative father and received, in verbatim form, the pre-birth notice required by I.C. 31-19-3-4. The notice advised him that nothing anyone said to him relieved him of his obligations under the notice. Thus, the Court, said, the putative father was alerted that the statutory notice, and only the notice, contained the required legal information. The statement contained in the letter that the putative father received from the adoptive parents' attorney should not have been considered insofar as it was inconsistent with the terms of the notice. *Id.* at 577. To the putative father's argument that the adoptive parents' attorney did not advise him that should obtain his own counsel, the Court stated that the statute did not require the notice to advise him of his right to be represented by an attorney. The pre-birth notice the putative father received substantially complied with the dictates of the statute.

I.C. 31-19-9-15 is a nonclaim statute that is not subject to equitable exceptions . The putative father argued that in *In re Paternity of M.G.S.*, 756 N.E.2d 990 (Ind. Ct. App. 2001), the Court wrongly decided that I.C. 31-19-9-15 was a nonclaim statute and, therefore, was not subject to equitable exceptions. The statute, in relevant part, states that a putative father's consent to the adoption of the child is irrevocably implied if the putative father fails to file a



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paternity action within thirty day after receiving actual pre-birth notice under I.C. 31-19-3. The putative father contended the statute should be considered a statute of limitations, but the Court disagreed. It found the reasoning of the M.G.S. Court still valid: The statute is jurisdictional in nature, and a putative father forgoes his right to establish paternity if he fails to file his paternity action within thirty days of receiving the pre-birth notice.

The putative father's initiation of DNA testing within the thirty day period prescribed by I.C. 31-19-9-15 did not constitute substantial compliance with the statute.

The putative father argued that while he did not strictly comply with the statute by filing a paternity action within thirty days after receiving the pre-birth notice, he substantially complied by initiating DNA testing within that period. The Court again disagreed, reiterating that the statute was a nonclaim statute, and, as such, was not subject to any equitable deviation from the thirty day time limit. The putative father had received unequivocal notice and was clearly informed of what he was required to do if he wished to contest the adoption. He failed to comply. The Court noted that even if it were inclined to hold that initiating DNA testing would constitute substantial compliance with I.C. 31-19-9-15, it would not do so in this instance because the putative father failed to demonstrate any intent to play an active role in the child's life. *Id.* at 578.

I.C. 31-19-9-15 was constitutionally applied in this case. Finally, the Court dismissed the putative father's argument that the statute was unconstitutionally applied. The M.G.S. Court addressed the due process challenge, and the putative father in this case had not raised any additional argument that would cause the Court to review its holding. The putative father received clear notice of the potential adoption and was informed of his obligation under the statute. Because his own failure to act on the notice deprived him of his opportunity to be heard in the adoption proceedings, his constitutional rights were not violated.

Appointment of a guardian ad litem. The Court noted that it would have been both appropriate and desirable to appoint a guardian ad litem to represent the best interests of the child in the adoption proceedings in this case. *Id.* at 579, f.n.6. While the putative father's paternity action was time barred, a paternity petition filed by the child would not be similarly barred. A guardian ad litem could proceed in the child's best interest since the child was incompetent to do so herself.